# B.H.L. Manufacturing, Inc. and Industrial Union, Allied Industrial Workers of America, AFL-CIO. Case 25-CA-11155

October 19, 1981

# **DECISION AND ORDER**

# By Members Fanning, Jenkins, and Zimmerman

On June 15, 1981, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding, finding that the Respondent had not violated the Act, and dismissing the complaint in its entirety. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed limited cross-exceptions and a supporting brief, and a motion to correct certain clerical errors in its answering brief.<sup>1</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the rulings, findings, and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order.

## **ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

## **DECISION**

## STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This case was heard before me in Fort Wayne, Indiana, on January 12 and 13, 1981, pursuant to charges filed on July 24, 1979. A complaint issued August 22, 1979, and was subsequently amended on February 12 and 15, 1980. As amended the complaint alleges that 28 employees were refused recall from layoff status on or about May 7, 1979, because of their union activities, all in violation of Section 8(a)(3) and (1) of the Act. There is no allegation or evidence of any other violations of the Act.

Upon the entire record, together with my careful observation of the demeanor of the witnesses as they testified, and after consideration of the post-hearing briefs submitted, I hereby make the following:

#### FINDINGS AND CONCLUSIONS

### I. JURISDICTION

Respondent, an Indiana corporation, has maintained its principal office and place of business at Fort Wayne, Indiana, and has been at all times material engaged at said location in the manufacture, sale, and distribution of toys and related products. During the 12 months preceding issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, purchased, transferred, and delivered to its Fort Wayne facility, goods and materials valued in excess of \$50,000 directly from points located outside the State of Indiana. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. SUPERVISORY STRUCTURE

At all times material herein, the following-named persons occupied positions set opposite their respective names and have been, and are now, agents of Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Norman Meyers	Executive Vice President
Cornell Etoll	Shop Superintendent
Robert Neff II	Foreman
Fred Robinson	Shop Superintendent from on or about January 2, 1979, to the present

# IV. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges the following as unlawfully refused recall:

Selena Arrington	Willie Larry
Linda Cartwright	Debra Lewis
Pam Falls	Karen Lunde
Rose Gase	Maria Mauricio
Kristin Gennari	Rita Mercer
Diane Hall	Karen Miller
Anne Headen	Janice Minick
Mildred Jackson	Cynthia Murphy
Darlene Jaggers	Joette Nicole
Maxine Johnson	Brenda Parnin
Olgia Johnson	Benita Perez
Karen Keesler	Olivia Perez
Karen Kieper	Sheri Robbins
Leona Laird	Tina Underwood

<sup>1</sup> Errors in the transcript are noted and corrected

<sup>&</sup>lt;sup>1</sup> In the absence of opposition to Respondent's motion, we hereby grant such motion and make the requested clerical corrections in all copies of its answering brief.

<sup>&</sup>lt;sup>2</sup> Member Jenkins does not rely on Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1981), for the principle that the General Counsel has the burden of proving a prima facie case; that principle was established generations before Wright Line.

By mailgram of November 17, 1978, the Union advised Respondent the following were members of its organizing committee:

Leona Laird Selena Arrington Willie Larry Pamela Falls Maxine Johnson Debra Lewis Rose Gase Karen Lunde Rita Mercer Kristin Gennari Diane Hall Karen Miller Cynthia Murphy Ann Headen Mildred Jackson Brenda Parnin Olivia Perez Darlene Jaggers Janet Ramos Olgia Johnson Karen Kieper Sheri Robbins

### Tina Underwood

About 2 weeks before the December 8, 1978, election in Case 25-RC-7033, the Union issued a pamphlet containing all the above names as members of its organizing committee plus Linda Cartwright, Karen Keesler, Maria Mauricio, Janice Minick, Joette Nicole, Michael Payton, and Berita (Benita) Perez.

At the hearing, the General Counsel withdrew the allegation with respect to Diane Hall, and the General Counsel and Respondent stipulated that the following employees were discharged on or about November 27, 1978:

Shelly Johnson Maria Mauricio Sheri Gaff Marjorie Bellinger Linda Cartwright Benita Perez Tina Blair Maxine Johnson Jeanette Nicola<sup>2</sup> Cynthia Murphy Martin Klug Connie Gibson

# Rose Gase

Of the 30 person organizing committee listed by the Union in its mailgram and pamphlet, only Michael Payton and Janet Ramos were not alleged as discriminatees. The record is silent as to what happened to Payton but his name does not appear on the various lists in evidence, and I conclude he did not work in January 1979 or later. The General Counsel attempted to adduce, but failed to do so, that Ramos had defected from the Union. Of the remaining 28 committeemen, the allegation as to Diane Hall was withdrawn, and 73 were terminated in November 1978, more than 6 months prior to the filing of the charge,4 which leaves 20 committee members as alleged discriminatees:

Selena Arrington	Willie Larry
Pamela Falls	Debra Lewis
Kristin Gennari	Karen Lunde
Ann Headen	Rita Mercer
Mildred Jackson	Karen Miller
Darlene Jaggers	Janice Minick

<sup>&</sup>lt;sup>2</sup> I conclude that Joetta Nicol and Jeanette Nicola are the same person. <sup>3</sup> Cartwright, Nicole, Gase, Mauricio, Benita Perez, Maxine Johnson, and Cynthia Murphy.

Olgia Johnson	Brenda Parnin
Karen Keesler	Olivia Perez
Karen Kieper	Sheri Robbins
Leona Laird	Tina Underwood

Of these 20, the General Counsel seeks backpay, and presumably reinstatement, for 18 of them, leaving out Darlene Jaggers and Karen Kieper.

The parties stipulated that 23 employees were laid off on November 27, 1978, of whom 8 were organizing committee members.5

After the November layoffs and discharges, a Board election was conducted on December 8, 1978, among Respondent's employees, pursuant to an October 31, 1978, election petition filed by the Union in Case 25-RC-7033. The Union lost 62 to 28, with 3 challenged ballots. Thereafter, on December 15, 1978, Respondent laid off all of its remaining employees.

On or about January 2, 1979, Respondent recalled three of the employees laid off the previous November. They were Committee Members Karen Miller and Kristin Gennari, together with Ann Wormbly who was not on the committee. By January 4, 1979, Respondent had recalled 53 rank-and-file employees, of whom 96 were committee members. The plant again shut down on January 10, 1979.

In April 1979, Respondent again commenced operations. By May 5 it had a total of 20 employees. This rose to 45 employees on May 7, and 77 employees on June 26. During this period only 4 of the 23 employees laid off the previous November reappear on the payroll.7 Moreover, of the 77 employees on June 26, 1979, only 34 were employed by Respondent at the time of the December and January shutdowns. The plant again shut down on or about July 1, 1980, and was not in operation at the time of the hearing.

Of the 20 alleged discriminatees remaining, Respondent presented uncontroverted testimony from Vice President Norman Meyers that Selena Arrington, Karen Kieper, Debra Lewis,8 and Karen Lunde quit their employment with Respondent and Sheri Robbins either quit or was terminated.9 The list of possible discriminatees thus diminishes to 15. It shrinks to 14 by virtue of Meyers' credible uncontroverted testimony that Darlene Jaggers was not recalled in May 1979 because of her attitude, attendance, workmanship, and a refusal to sign a 3day suspension notice given her by Respondent. Karen Miller went in to work on the second shift January 2, 1979, but was sent home along with others after 4 hours because there was a problem with the heating system.

<sup>&</sup>lt;sup>4</sup> January 24, 1979, is the statutory limitations date in this case.

<sup>&</sup>lt;sup>5</sup> Karen Miller, Kristin Gennari, Ann Headen, Pamela Falls, Janice Minik, Mildred Jackson, Karen Lunde, and Darlene Jaggers.

<sup>&</sup>lt;sup>6</sup> Olivia Perez, Leona Laird, Kristin Gennari, Olgia Johnson, Janet Ramos, Karen Keesler, Tina Underwood, Karen Miller, and Willie Larry.

<sup>&</sup>lt;sup>7</sup> Ann Wormbly, Helen Brock, Diane Heistand, and Theresa Price. <sup>8</sup> I note that Debra Lewis' personnel file bore the notation "quit."

<sup>9</sup> I credit Meyers, noting that no adverse inference may be properly

drawn from his failure to proffer supporting documentation into evidence because Respondent's personnel files relating to the discriminatees were present at the hearing, made available to the General Counsel, and some were utilized by the General Counsel in his examination of witnesses as the record clearly shows. I must conclude the General Counsel found nothing in the records to contradict Meyers.

She was told to listen to the radio to find out if the heat problem was solved. Her supervisor, Bob Neff, called her on January 4 and asked her if she was returning to work or preferred staying on layoff. She told Neff she would stay on layoff. At the hearing, she asserted her reason for not returning was an inability to work the second shift because she had two children at home. There is no showing she communicated this to Neff or ever again contacted Respondent to advise it that she was available for work until she was recalled in August 1979 pursuant to the commencement of the action before me. In the circumstances I am persuaded that Respondent had no obligation to try to recall her in May 1979, before any charge was filed, or to even believe she was again available for employment.

There is no evidence on the reasons for not recalling Mildred Jackson, Rita Mercer, or Brenda Parnin in May 1979.

With respect to Janice Minick, Meyers credibly testified that she did mediocre work, which gains some support from a timestudy of October 20, 1978, which notes she was too slow for the work she was performing and looked around too much.

According to Meyers, he instructed someone to recall Leona Laird in May 1979, and he believes efforts were made to contact her by phone. This is not overly strong evidence, but it is all the evidence presented on the matter. Meyers did not appear to be dissembling and I am persuaded some effort was made to recall Laird.

Meyers testified that Karen Keesler was not recalled in May because she was not one of the best employees Respondent had. This opinion was neither proved nor disproved by the evidence.

Meyers testified Pamela Falls was not recalled in May because her work performance was inadequate. An October 1978 timestudy shows her work was slow. Falls' recollections were vague and unreliable. She did not impress me as a witness whose memories should be credited in view of their fragmentary, inconsistent, and selective nature.

Meyer asserts Olgia Johnson was not recalled in May because she gave false information to Respondent with regard to the events leading to Cynthia Murphy's termination in November 1978. Johnson was recalled in January 1979. Johnson does not deny giving the false information in regard to Murphy.

Willie Larry conceded her absence record was poor and she had been twice warned about it. She also asserts she was told in February 1979 she would not be called back because her wages had been garnisheed. Meyers testified she was not called back because of her attendance and inability to perform the work.

Ann Headen had never worked on the Etch-A-Sketch line and Meyers testified that experience on that line was a prerequisite for recall in May.

Kristen Gennari was offered second-shift employment, which she declined, when she was laid off in November 1978. Kenneth Folk testified that she told him in January 1979 that she would not be available for recall because she was returning to the east coast. Gennari is a native of Massachusetts and states she returned to Massachusetts over the 1978 Christmas holiday but then returned to

Fort Wayne, Indiana, and worked for Respondent the following January. She denies any conversation with Folk about her return to the east or her availability for employment. I credit Gennari that she went to Massachusetts over the Christmas holiday, but I do not credit her assertion that she never talked to Folk about returning east or her availability for employment. Folk impressed me as a certain witness on this point and his testimony on his January conversation with Gennari is believable and credited. That Gennari may not have followed through on her intention to return to Massachusetts permanently does not mean she did not have that intention in January when she talked to Folk.

Tina Underwood credibly testified she was not recalled in May 1979. Meyers states Underwood was a good employee and he was told that someone at Respondent's facility had tried to recall her. Meyers thus has only hearsay information as to whether or not an effort was made to recall her.

Meyers testified Olivia Perez was not recalled because of her attendance and inability to get along with other employees. Perez agrees her attendance was poor. Folk credibly named four employees who had complained about Perez and avers Perez had trouble getting along with other employees.

The reasons given by Respondent for not recalling some few of the alleged discriminatees are not entirely free from question, but this provides no support for the General Counsel's case.

This case is singularly free from any evidence of unlawful motivation. All that Respondent did, to express its attitude on the Union so far as the record shows, was to issue a letter from Meyers to all employees on November 28, 1978, 10 which contains nothing of an interfering, restraining, or coercive nature, and certainly no threat of reprisal or force or promise of benefit. The letter clearly falls within the ambit of Section 8(c) of the Act and is not probative evidence supporting the General Counsel's case.

In addition to the total absence of any direct evidence of unlawful motivation, the timing of Respondent's failure to recall some 5 months after the Union had lost the election by a more than two-to-one margin, and 4 months after Respondent had indeed called back known union adherents, suggests no plot to retaliate against those employees for past union activities. Moreover, there is no showing of any continuing union activity after the December 1978 election.

Contrary to the General Counsel, Great Dane Trailers<sup>11</sup> is not applicable to the facts before me. The 28 possible discriminatees whom the General Counsel alleged in the complaint and in his opening statement dwindled, by way of stipulations and credible uncontroverted testimony, to a very charitable 14. Of the remaining 14, Respondent had reason to believe Miller and Gennari were not interested in recall, made an effort to recall Laird, and may have tried to recall Underwood. The 28 has now shrunk to 11 at most, and perhaps to 10. Why the General Counsel yet persists in a Great Dane theory I do

<sup>10</sup> G.C. Exh. 15.

<sup>&</sup>lt;sup>11</sup> N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

not know, but I find that the General Counsel has not shown any employer conduct "so inherently destructive of employee interests" that proof of motivation is unnecessary. There is no showing that Respondent distinguished between employees to be recalled on the basis of their union activities, <sup>12</sup> and there is no reason in law or logic on the evidence before me to conclude that Respondent's conduct on its face is *prima facie* unlawful, or that employee rights have been adversely affected.

Leaving Great Dane and turning to Wright Line, <sup>13</sup> I find and conclude the General Counsel has not made a prima facie showing sufficient even to support an inference that protected conduct was a motivating factor in selection for recall. Consequently, Respondent has no burden of justifying those selections. That it has chosen to do so, and in most cases clearly has, serves only to emphasize the weakness of the General Counsel's case. What the General Counsel appears to be urging is that unless Respondent comes forth with totally unassailable reasons for failing to recall each laid- off committee member, voila! unlawful motivation is clear. Not so at all. Respondent is under no obligation to justify its conduct unless and until the General Counsel shows by direct or circumstantial evidence that Respondent's failure to

recall sprang from a motive to discourage union activity. The General Counsel has not so shown, and nothing brought forth at the hearing can be maneuvered into the vaguest semblance of a *prima facie* case requiring rebuttal by Respondent.

#### CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of the Act.
- 2. The Union is a labor organization within the meaning of the Act.
- 3. The General Counsel has not established by a preponderance of the evidence that Respondent has violated the Act as alleged in the complaint or in any other

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I make the following recommended:

## ORDER 14

The complaint is dismissed in its entirety.

<sup>&</sup>lt;sup>12</sup> There was no reason in May 1979 for Respondent to do so. The Union was gone and no longer a matter of concern.

<sup>13</sup> Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980).

<sup>&</sup>lt;sup>14</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.